No. 82-1872

In the Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD MESSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly denied petitioner's motion to suppress evidence discovered pursuant to a valid, untainted search warrant.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 20-21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1982 (Pet. App. 20). A petition for rehearing was denied on February 22, 1983 (Pet. App. 22). The petition for a writ of certiorari was filed on May 17, 1983, and is therefore out of time under Rule 20.1 of the Rules of this Court.[1]

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[1]On April 21, 1983, Justice Powell denied a motion for an extension of time to file the petition for a writ of certiorari.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, and conspiracy to manufacture and distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of four years' imprisonment on each count and a three-year special parole term on Count 1. The court of appeals affirmed (Pet. App. 20-21).

1. The evidence at the suppression hearing showed that DEA agents set up surveillance outside petitioner's residence in North Miami Beach, Florida, on October 7, 1980, based on a reliable informant's tip that two men were going to make a cocaine delivery to petitioner's house. At approximately 8:30 p.m., two men arrived at petitioner's house with a large brown bag. While the men were inside the house, the informant was contacted again. The informant told the agents that the cocaine was inside the house at that time. Based on this information and the agents' observations, Agent Doredant left the area at approximately 9:00 p.m. in order to consult with the United States Attorney's Office about getting a search warrant. Ultimately, Agent Doredant returned without having secured a warrant (Tr. 7, 10, 16, 22-23, 123, 127-129, 133).[2]

At approximately 9:30 p.m., the two men were observed leaving the house. They placed a container in the back of their station wagon and drove away. Three DEA agents stopped the vehicle a short distance away and arrested the two men. The agents then searched the station wagon and found a metal tool box in the spare tire well. Agent Tomaino, who subsequently arrived at the scene, observed

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[2]"Tr." refers to the transcript of the suppression hearing.

that the box was locked, but he detected a strong odor of cocaine emanating from it. The tool box was returned to the tire well unopened, and the vehicle was driven back to petitioner's residence. During this time, another agent observed petitioner leaving his house by car. Petitioner's vehicle was stopped, and he too was arrested by DEA agents (Tr. 67-72).

Agents Scharlatt and Sarron returned to petitioner's residence after the arrests and secured the premises until they were relieved by other agents later that night. During this time, several people stopped at petitioner's house and inquired whether petitioner was at home. The agents told the visitors that petitioner was not at home and that they were waiting for him also, and they did not allow the persons to enter. Agents Sarron and Scharlatt were relieved around midnight by Agents Hahn and Tomaino, who were later joined by other agents. These agents maintained the guard over the premises and did not allow anyone to enter (Tr. 43-61, 73-77, 139-141).

On the morning of October 8, 1980, Agent Doredant applied for a warrant to search petitioner's house. The affidavit (see C.A. App. a13-a17) related the information received from the confidential informant and the observations made by the DEA agents outside petitioner's house. In particular, the affidavit recited the observation of the visit of the two men, their subsequent arrest, and the fact that a tool box in the rear of their vehicle smelled of cocaine. The affidavit further stated that DEA agents had secured the premises and that no one had entered the house. A warrant was then issued authorizing the search of petitioner's residence, and the search was conducted at approximately 3:00 p.m. on October 8, 1980. During that search, DEA agents discovered, *inter alia*, a triple beam scale, lidocaine, sodium chloride, and 500 grams of benzoylecgonine (a by-product

of the cocaine purification process) (Trial Tr. 473-477, 483, 520-525).[3]

2. The district court denied petitioner's motion to suppress the evidence seized pursuant to the warrant search. The court rejected petitioner's argument that the warrant was not supported by probable cause. Petitioner also argued that the evidence should be suppressed because two witnesses testified (contrary to the testimony of the officers) that the officers had entered the house before the warrant was issued.[4] The district court made no factual finding on whether there had been such an entry; it found that factual question "immaterial" because "[t]he warrant does not appear to be based on any information allegedly obtained by the prior entry" (Pet. App. 23).

The court of appeals affirmed (Pet. App. 20-21). It explained that petitioner did not "suggest that the valid search warrant was obtained in reliance on, or by use of any information gathered by, the prior [alleged illegal entry]" (*id.* at 21). The court then held that the district court correctly denied the suppression motion "[b]ecause the information in the affidavit used to obtain the search warrant was independently gathered and did not come from anything having to do with the prior transgression" (*ibid.*).

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[3]A search of the vehicle and tool box of the two visitors to petitioner's house, pursuant to a different warrant, uncovered six and a half pounds of cocaine (Trial Tr. 526-527B).

[4]Michael McCullough testified that on one of two occasions that he stopped at petitioner's house while the officers were awaiting the warrant, he saw someone walk to the window inside the house (C.A. App. a84). Patrick McCullough testified that he stopped at petitioner's house at 11:45 p.m. on October 7. He saw no one outside, and he stated that a man opened the door and invited him inside, where he saw a second man (C.A. App. a40-a52). See generally Pet. 9-10.

ARGUMENT

Petitioner contends (Pet. 11-19) that the evidence should be suppressed because of the alleged illegal entry into the house before the warrant was executed. Assuming arguendo that there was such an entry, this contention is without merit.

It is black letter law that evidence must be suppressed only if it is the "fruit" of an illegality, which presupposes, at a minimum, some causal connection between the illegality and the discovery of the evidence. See *United States* v. *Crews*, 445 U.S. 463, 471 (1980); *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963). As the court of appeals noted (Pet. App. 21), petitioner does not even suggest any way in which the alleged illegal entry could have contributed to the discovery of the evidence or the issuance of the warrant.[5] It is uncontested that the evidence was discovered during a valid warrant search, and petitioner himself admits (Pet. 17) that the affidavit underlying the warrant was not based on any facts obtained from an illegal entry. The text of the affidavit (C.A. App. a14-a17) plainly shows that the warrant was based on probable cause known to the agents before they secured the premises. Thus, the warrant was untainted, and the government manifestly carried its burden of showing that the evidence was obtained through a source independent of any illegality.

Petitioner's argument essentially is that a Fourth Amendment violation requires suppression of all after-acquired evidence, regardless of established exclusionary rule principles such as the requirement that the suppressed evidence be a fruit of the violation. This argument has repeatedly been

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[5]The argument section of the petition, although filed out of time, is simply a verbatim reprinting of the relevant portion of petitioner's brief in the court of appeals (substituting "petitioner" for "defendant"), complete with the same typographical errors.

rejected by this Court. See, *e.g.*, *United States* v. *Payner*, 447 U.S. 727, 734 (1980); *United States* v. *Ceccolini*, 435 U.S. 268, 275-276 (1978).[6]

In *Segura* v. *United States*, cert. granted, No. 82-5298 (Feb. 22, 1983), this Court is considering the question whether an antecedent illegal entry to secure the premises requires suppression of evidence subsequently discovered pursuant to an untainted search warrant. *Segura* differs from the instant case in one significant respect. In *Segura*, the apartment was occupied when the officers entered, and hence the district court hypothesized that the illegal entry could have contributed to the discovery of the evidence by preventing the occupants of the apartment from destroying the evidence before the warrant issued. See *United States* v. *Segura*, 663 F.2d 411, 416-417 (2d Cir. 1981). See also *United States* v. *Allard*, 634 F.2d 1182, 1187 & n.6 (9th Cir. 1980). Even that tenuous causal connection is absent here, since petitioner's house was empty and lawfully secured from the outside when the illegal entry allegedly occurred. Accordingly, even if this Court reverses the court of appeals' decision in *Segura*, petitioner would not necessarily be entitled to prevail here.

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[6]Indeed, in the district court, petitioner did not even focus on the suppression of the evidence. Rather, he contended that the alleged illegal entry required dismissal of the prosecution. See Tr. 186-187.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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